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SUPREME COURT, U.S.

No. 80-5492

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

TOMMY WHACK

Appellant

v.

STATE OF MARYLAND

Appellee

ON APPEAL FROM THE

COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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Appellee, State of Maryland, pursuant to Rule 16 of this Court, moves to dismiss the above-entitled appeal, or in the alternative, to affirm the judgment of the Court of Appeals of Maryland on the grounds that the appeal fails to present any substantial federal question, and that this case does not properly invoke the appellate jurisdiction of this Court.

QUESTION PRESENTED

Does the Double Jeopardy Clause prohibit imposition of cumulative punishments for convictions, obtained in a single proceeding, of offenses deemed "the same offense," despite the holding of the State's highest court that the legislature intended such a result?

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OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported at ____ Md. ____, 416 A.2d 265 (1980).

JURISDICTION

Appellant invokes the jurisdiction of this Court under 28 U.S.C. §1257(2).

STATEMENT OF THE CASE

This is a direct appeal from the judgment of the Court of Appeals of Maryland (hereinafter, "the Court of Appeals"). The opinion of the Court of Appeals, filed July 7, 1980, was preceded by an unreported per curiam decision (Whack v. State, September Term, 1978, No. 1394, July 27, 1979) of the Court of Special Appeals of Maryland, which affirmed the conviction and sentencing of Appellant by the Circuit Court for Prince George's County, Maryland. In the circuit court proceeding, Appellant was convicted by a jury of robbery with a deadly weapon and use of a handgun in commission of that crime and was sentenced to consecutive terms of twenty years and five years pursuant to Article 27, §§ 36B(d) and 488 of the Annotated Code of Maryland.

In challenging the consecutive sentences imposed by the trial court, Appellant pressed two contentions in the Court of Appeals: first, that the Maryland General Assembly, in enacting §§ 488 and 36B(d), did not intend to authorize the imposition of both the penalty under § 488 for the use of a dangerous or deadly weapon, and the enhanced penalty of from five to fifteen years under § 36B(d) for use of a handgun; and second, that if the legislature did so intend, the imposition of both enhanced penalties would nevertheless violate the Fifth Amendment's prohibition against double jeopardy.

The Court of Appeals rejected both contentions after determining that the legislature's intent to impose consecutive punishment under §§ 488 and 36B(d) was controlling. The court specifically relied upon the legislature's Declaration of Policy, set forth in Article 27, § 36B(a), in recognizing the General Assembly's view of handguns "as a particularly aggravating problem and one not effectively controlled by the laws applicable to weapons generally." 416 A.2d at 270. After reviewing the provisions of the handgun control statute, Art. 27, §§ 36B - 36F, the court found a clear and plain legislative intent to permit imposition of consecutive sentences under the statutes in question when one commits a robbery with a handgun. Id. at 271. The Court of Appeals distinguished Simpson v. United States, 435 U.S. 6 (1978), a case Appellant argued was dispositive, by comparing the unmistakeable rationale of the Maryland legislature with the absence of legislative history pertaining to the challenged statute in Simpson. Id. at 269.

The Court of Appeals incorporated its legislative intent analysis as the basis for rejecting Appellant's double jeopardy claim. Having previously determined that the "required evidence" test of Blockburger v. United States, 284 U.S. 299 (1932), was essentially a rule of statutory construction, citing Whalen v. United States, ___ U.S. ___, 100 S.Ct. 1432, 1438 (1980), the

court further relied on Newton v. State, 280 Md. 260, 284, 373 A.2d 262, 269, n. 4 (1977):

> "It should be noted, however, that under certain circumstances, multiple punishment . . . for offenses deemed the same under the required evidence test do[es] not violate the Fifth Amendment prohibition against double jeopardy . . . [T]he legislature may indicate an express intent to punish certain conduct more severely if particular aggravating circumstances are present by imposing punishment under two separate statutory offenses which otherwise would be deemed the same under the required evidence test. . . ."

416 A.2d at 271.

ARGUMENT

I.

THIS CASE IS NOT WITHIN THE APPELLATE JURISDICTION OF THIS COURT AND MUST BE DISMISSED.

Appellant has chosen an incorrect and untimely avenue for seeking this Court's review of his state court conviction. His contention here is that the double jeopardy clause prohibits the imposition of cumulative punishments for convictions obtained in a single proceeding of crimes deemed "the same offense" despite the holding of the State's highest court that the Legislature intended such a result. In essence, the constitutionality vel non of the state statute itself is not brought into question; instead, Appellant argues that his right to be free from double jeopardy precludes application or use of the statute to the circumstances of his case. The decision of the Court of Appeals did not consider the constitutionality of the statute because no such challenge was presented to it. In this posture, review may be had by certiorari only. 28 U.S. Code, §§ 1257(2) and (3); Kulco v. Superior Court of California, 436 U.S. 128 (1978); see also Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

Accordingly, the appeal should be dismissed and the papers treated as an application for a writ of certiorari. Such an application must in turn be denied, for the reasons asserted in Argument II, infra, as well as for the reason that Appellant has

failed to comply with the time limits of Rule 22 of this Court which requires a petition for a writ of certiorari be filed within 60 days after entry of the lower court's judgment. The judgment of the Court of Appeals was filed on July 7, 1980; this appeal was not filed until October 3, 1980, well beyond the applicable 60 day limitation.

II.

THE DECISION OF THE COURT OF APPEALS OF MARYLAND IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL.

The lack of a substantial federal question is patent in this case. The Court of Appeals correctly decided the issues herein on state statutory grounds by determining the Maryland legislature's plain intention that the punishment for robbery with a dangerous or deadly weapon could be coupled with a separate consecutive sentence under § 36D(d) of handgun control act. By directing its inquiry to ascertaining legislative intent, the Court of Appeals properly applied the analysis of this Court's recent decisions in this area. See, e.g., Whalen, supra; Busic v. United States, ___ U.S. ___, 100 S.Ct. 1747 (1980).

In Brown v. Ohio, 432 U.S. 161 (1977), this Court observed that the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors, and that the legislature remains free under the double jeopardy clause to define crimes and fix punishments. 432 U.S. at 165. Enactment of legislation serves to limit courts, which may not impose more than one punishment for the same offense, and prosecutors, who ordinarily may not attempt to secure that punishment in more than one trial. Id. However, the double jeopardy clause does not substantively restrict the legislative branch:

> Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. See Gore v. United States, 357 U.S. 386 (1958); Bell v. United States, 349 U.S. 81 (1955); Ex Parte Lange, 18 Wall 163, 21 L.Ed. 872 (1874).

Id. Accord, Whalen v. United States, ___ U.S. ___, 100 S.Ct. 1432, 1436 (1980); Ianelli v. United States, 420 U.S. 770, 785, n. 17 (1975).

Thus in determining whether a sentencing court has properly stayed within its legislative authorization when imposing multiple punishments, the intent of the legislature is paramount. Appellant suggests in his jurisdictional statement that this Court has on three previous occasions (Whalen, Simpson and Busic) accepted cases presenting issues similar to those he now raises. However, Appellant acknowledges those cases never reached "the constitutional question" because each was decided on statutory grounds which obviated the need for constitutional srutiny. This Court's approach in those cases obviously reflects adherence to the longstanding doctrine that it will avoid a constitutional ruling where a statutory ruling would suffice. See Hagans v. Levine, 415 U.S. 528 (1974); Ashwander v. TVA, 297 U.S. 288, 347 (Brandeis, J., concurring). In each case, the Court's decision turned on ascertainment of congressional intent regarding the imposition of sentence; where that intent was unclear, such as in Whalen, this Court "applied the rule of lenity" and held that the multiple punishment could not stand. Whalen, ___ U.S. ___, 100 S.Ct. at 1436.

In the instant case, the penalties imposed were explicitly authorized by the Maryland legislature in an unambiguous manner, rendering application of the rule of lenity inappropriate. Where the legislative authorization is clear, the potential for arbitrariness by prosecutors and courts is minimal and no issue of constitutional dimension arises under the Fifth Amendment by the imposition of sentences upon Appellant pursuant to Article 27, §§488 and 36B(d).

Finally, it is instructive to note this Court's recent disposition of an appeal from the decision of the Michigan Supreme Court in People v. Brintley, which was consolidated with

Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 793 (1979), appeal dismissed sub nom. Brintley v. Michigan, (Mem.) 444 U.S. 948 (1979). In Brintley, the defendant was convicted of the separate crimes of armed robbery, and possession of a firearm during a felony. He received consecutive sentences in accordance with Michigan's felony firearm statute which is essentially identical to the Maryland handgun statute at issue in the instant case.[1] The Court of Appeals of Michigan, in an opinion reported at 272 N.W.2d 587, vacated the firearm possession conviction, on the grounds that the double jeopardy clauses of the United States and the Michigan Constitutions were violated by the separate convictions and cumulative punishments for the armed robbery felony and the firearm felony.

The Michigan Supreme Court, in a well-reasoned opinion, reversed the lower appellate court and reinstated Brintley's firearm conviction. In addition to finding a clear legislative intent to punish firearm possession by a separate sentence consecutive to that imposed for the underlying felony, the Michigan Supreme Court also determined that neither the federal nor state double jeopardy clauses is an impediment to the imposition of consecutive sentences. 280 N.W.2d at 796-801.

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[1] Michigan's felony firearm statute, MCL § 750.227b; M.S.A. § 28.-424(2) states in pertinent part:

> "A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violation of section 227 [carrying a concealed weapon] or section 227a [unlawful possession of a weapon by a licensee], is guilty of a felony, and shall be imprisoned for 2 years.
>
> * * * *
>
> The term of imprisonment prescribed by this seciton shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony."

Brintley's appeal to this Court was dismissed for want of a substantial federal question, 444 U.S. 948 (1979). The precedential effect of that dismissal anticipates that this appeal, presenting the same issues, on essentially identical facts, with similar statutes, should also be dismissed. See Hicks v. Miranda, 422 U.S. 332, 344-345 (1975); Mandel v. Brantley, 432 U.S. 173, 176 (1977).

CONCLUSION

For the foregoing reasons, Appellee prays that the appeal be dismissed or the decision of the Court of Appeals of Maryland be affirmed.

Respectfully submitted,

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